UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION SECURITY, INC.,	)	
Employer	)	
and	)	CASE No. 17-RC-12354
INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),	)	
Petitioner	)	

BRIEF OF AMICUS CURIAE, THE HONORABLE JOHN L. MICA, UNITED STATES HOUSE OF REPRESENTATIVES

I. INTRODUCTION

On June 30, 2005, the Board granted the Employer's request for review on the ground that it raised substantial questions of first impression including "whether the Board has statutory jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction." By order dated July 7, 2005, the Board invited the parties and interested amici to file briefs on or before August 4, 2005 addressing the issues posed. This brief is submitted by United States Congressman John L. Mica in support of the position that the Board does not have jurisdiction over privately employed airport screeners and, to the extent jurisdiction exists, the Board should decline to exercise such jurisdiction.

II. INTEREST OF AMICUS CURIAE

U.S. representative John L. Mica is currently serving his seventh term in Congress representing Florida's 7th Congressional District. Representative Mica serves on

numerous House committees, including the Committee on Transportation and Infrastructure. In 2001, he was named Chairman of the U.S. House of Representatives Aviation Subcommittee, which has oversight of all matters regarding civil aviation including, among others, the issue of aviation safety and security.

In the days and weeks following the tragic events on September 11, 2001, Congress struggled with how to appropriately respond to the terrorist attacks on our Nation while at the same time restoring confidence in the aviation system. In his role as the Chairman of the House Aviation Subcommittee, Representative Mica played a central role in this effort. He helped author and was instrumental in the passage of the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA) and the Federal security screening programs it administers.

Because of his critical personal involvement in the legislation that underlies the issues now before the Board and his abiding interest in ensuring that the will of Congress, as expressed in ATSA, is carried out, Congressman Mica brings a unique and informative perspective to these issues that the parties themselves may not possess. Congressman Mica's interests are not with either party, but are based solely on federal policy regarding aviation security as intended by the United States Congress.

III. STATEMENT OF FACTS REGARDING CONGRESSIONAL WILL

A. H.R. 3150, the Secure Transportation for America Act of 2001

Congressman Mica was one of the original co-sponsors of H.R. 3150, the Secure Transportation for America Act of 2001 introduced in the House of Representatives on October 17, 2001. That bill eventually passed the House as the Airport Security

Federalization Act of 2001 on November 1, 2001. As passed by the House, H.R. 3150 directed the TSA to assume responsibility for airport security screening.

The bill did not specify that the screening functions had to be carried out by Federal Government employees (H.R. 3150, 107th Congress, section 102). Rather, it directed the TSA to "deputize, for enforcement of such Federal laws as the Under Secretary determines appropriate, all airport screening personnel as Federal transportation security agents and...ensure that such agents operate under common standards and common uniform, insignia, and badges." (H.R. 3150, 107th Congress, section 102) It also required that all screening of passengers and property at airports be supervised by uniformed Federal personnel of the TSA "...who shall have the power to order the dismissal of any individual performing such screening." ((H.R. 3150, 107th Congress, section 102). H.R. 3150 further directed that "an individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening." (H.R. 3150, 107th Congress, section 102). H.R. 3150 passed the House by a vote of 286 to 39.

B. S. 1447, the Aviation Security Act

The companion Senate bill, S. 1447, the Aviation Security Act, which passed the Senate on October 11, 2001, took a different approach. S. 1447 directed that the security screening function had to be carried out by Federal employees under the supervision of the U.S. Attorney General (S. 1447, 107th Congress, section 108). The only exception to this requirement in the Senate bill was that at small, non-hub airports the screening functions could be carried out by "qualified, trained State or local law enforcement

personnel if-- (A) the screening services are equivalent to the screening services that would be carried out by Federal personnel...; (B) the training and evaluation of individuals conducting the screening or providing security services meets the standards set forth...for training and evaluation of Federal personnel conducting screening or providing security services; (C) the airport is reimbursed by the United States, using funds made available by the Aviation Security Act, for the costs incurred in providing the required screening, training, and evaluation; and (D) the Attorney General has consulted the airport sponsor." (S. 1447, 107th Congress, section 108). Like H.R. 3150, S. 1447 prohibited individuals employed as security screeners from participating in a strike or asserting the right to strike. (S. 1447, 107th Congress, section 109). S. 1447 passed the Senate unanimously by a vote of 100 to 0.

On October 16, 2001, S. 1447 was sent to the House. On November 6, 2001, the House struck all language in S. 1447 after the enacting clause and inserted in lieu thereof the provisions of H.R. 3150.

C. Conference Committee

On November 6, 2001, the Speaker appointed conferees for consideration of the Senate bill and the House amendment. In Conference Committee on S. 1447, the conference committee members were tasked the responsibility of reconciling the two underlying bills. Congressman Mica was named to the Conference Committee and participated in conference negotiations. All conferees agreed that the airport screening function should be the responsibility of the Federal Government. Still, one major issue the conferees had to address was who should actually carry out the airport screening functions. The Senate directed that airport security screeners should be Federal

employees. The House, on the other hand, required deputized screeners under Federal employee supervision. However, the foundation of a program to qualify and utilize non-Federal screeners was in place in the Senate bill (S. 1447, 107th Congress, section 108).

The Conferees began negotiations immediately after being appointed. Chairman Don Young, Chair of the House Transportation and Infrastructure Committee, chaired the conference. Less than one week after the conferees were appointed, on November 12, 2001, American Airlines Flight 587 crashed in Queens, New York, and 265 people lost their lives. The existing sense of urgency surrounding S. 1447 became many times more magnified and the Conference Committee quickly reached a compromise. Just over two months after September 11, on November 19, 2001, the President signed into law the Aviation and Transportation Security Act (ATSA, P.L. 107-71).

D. The Intent Of ATSA

Pursuant to ATSA, the Federal Government would immediately take over responsibility for the airport security screening function. ATSA also created the Transportation Security Administration (TSA) to "be responsible for security in all modes of transportation..." (49 U.S.C. 114(d)). With regard to aviation security, the TSA was directed to "*provide for the screening* of all passengers and property...that will be carried aboard a passenger aircraft..." (49 U.S.C. 44901(a)) (emphasis supplied). For the first two years after enactment, screening at airports was to be carried out by Federal employees (49 U.S.C. 44901(a)). However Congress also directed the TSA to establish two Federal screening public-private partnership programs, the security screening pilot program (PP5) and the security screening opt-out program (Screening Partnership Program or SPP) (49 U.S.C. 44901(a); see also 44919 and 44920)). Both of these Federal

screening programs allow qualified private screening companies, under contract with the TSA and with strong Federal oversight, to carry out security screening functions at airports that choose to participate in the programs. As stated in the Conference Report:

> Two years after certification airports can opt out of the Federalization of the screener level of the Federal workforce if the Secretary determines that these facilities would continue to provide an equal or higher level of security. Companies will be barred from providing screening if they violate federal standards, are found to allow repeated failures of the system, or prove to be a security risk. The DOT will also establish a Pilot Program for 5 airports, one from each category type, to apply for the use of private contract screeners.

(Conference Report 107-296, p. 64).

Congress viewed the airport security screening role as an essential national security function, and the TSA was tasked with the provision of screening services. All screeners were seen as an important part of the layered security approach taken in ATSA. As stated in the Conference Report:

> The conferees recognize that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense, and that a safe and secure United States civil air transportation system is essential to the basic freedom of America to move in intrastate, interstate and international transportation.... The Conferees expect that security functions at United States airports should become a Federal government responsibility....

(Conference Report 107-296, p. 53).

All screeners were expected to play the same national security role in the new airport security system. Congressional intent was to ensure that all screeners, whether Federal employees or employees of Federal contractors participating in a Federal security program, were to be treated in a similar manner. In fact, Congress specifically required similar treatment and standards in order to ensure that critical national security

responsibilities were not compromised. Therefore, Congress placed several conditions on the PP5 and SPP Federal Screening programs including:

- The screening of passengers and property at the airport under section 44901 will be carried out by the screening personnel of a qualified private screening company under a contract entered into with the TSA;
- The TSA must provide Federal Security Directors to oversee all screening at each airport participating in the programs;
- The qualified private screening company will only employ individuals to provide such services who meet all the requirements of this chapter (49 U.S.C. 44901 et seq.) applicable to Federal Government personnel who perform screening services at airports under this chapter (49 U.S.C. 44901 et seq.);
- The qualified private screening company will provide compensation and other benefits to such individuals that are not less than the level of compensation and other benefits provided to such Federal Government personnel in accordance with this chapter (49 U.S.C. 44901 et seq.);
- The TSA determines and certifies to Congress that the private screening company is owned and controlled by a citizen of the United States, to the extent that the TSA determines that there are private screening companies owned and controlled by such citizens;
- For the SPP, that the level of screening services and protection provided at the airport under the contract will be equal to or greater than the level

that would be provided at the airport by Federal Government personnel in accordance with this chapter (49 U.S.C. 44901 et seq.); and

- The TSA may terminate any contract entered into with a private screening company to provide screening services at an airport under the PP5 or SPP if the TSA finds that the company has failed repeatedly to comply with any standard, regulation, directive, order, law, or contract applicable to the hiring or training of personnel to provide such services or to the provision of screening at the airport.

With regard to TSA personnel authority, Congress granted the head of the TSA the same authority "as the Administrator of the Federal Aviation Administration (FAA) under subsections (l) and (m) of section 106 [Title 49]." (49 U.S.C. 114(m)). Additionally, the head of the TSA was given the authority to "make such modifications to the personnel management system...as considered appropriate..." (49 U.S.C. 114(n)). Congress recognized that such flexibility was essential to TSA's critical national security role. As the conferees stated:

> The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners.

(Conference Report 107-296, p. 64).

By using the term "Federal screeners," the Conferees differentiated between the pre-9/11 aviation security model under which air carriers were responsible for screening passengers and the post-9/11 screening model under which this function became the responsibility of the Federal Government, to be carried out either by Federal employees

or private employees under a contract to the Federal Government. In fact, the Conferees noted:

> ...the terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the United States, required a fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system.

(Conference Report 107-296, p. 53).

To this end, the intent of Congress was that the PP5 and SPP programs were to be Federal security programs provided by qualified private screening companies under contract with the TSA. Further, private screeners were to be agents of the TSA and subject to the same conditions of employment as Federal security screeners.

IV. ARGUMENT

In creating the TSA, the PP5, and the SPP, Congress never intended there to be different expectations and standards for privately employed security screeners. To the contrary, Congress went out of its way to ensure that all screeners, whether Federal employees or those employed pursuant to a Federal contract and acting for the Government in a Federal program, be treated the same way and meet the same high employment standards. Thus, privately employed screeners must be employed by a qualified private screening company approved by and under contract with the TSA. Private screeners must be overseen by Federal Security Directors, just like Federal screeners. Private screeners must meet all the same employment requirements applicable to Federal Government personnel. Private screeners must receive compensation and other benefits that are not less than the level of compensation and other benefits provided to Federal Government personnel. Under the SPP, private screening companies must

establish that their employees will provide the level of screening services and protection equal to or greater than the level that would be provided at the airport by Federal Government personnel.

Even more, Congress specifically allowed the TSA to terminate any contract entered into with a private screening company if the TSA finds that the company has failed repeatedly to comply with *any* standard, regulation, directive, order, law, or contract applicable to the hiring or training of personnel to provide such services or to the provision of screening at the airport. As the Conference Committee explained, "...companies will be barred from providing screening if they violate federal standards, are found to allow repeated failures of the system, or prove to be a security risk." (Conference Report 107-296). Congress intended that all screeners, whether employed pursuant to a Federal contract or Federal personnel, must be held to the same security standards and must adhere to the same regulations, directives, orders, and laws.

In accordance with ATSA and the intent of Congress, the failure of a qualified private screening company participating in the Federal PP5 or SPP programs to adhere to TSA's determination regarding collective bargaining issued on January 8, 2003 in an Order by former TSA head Admiral J. M. Loy would be grounds to terminate the contract. The TSA's January 8, 2003 order is quite clear. It states:

> individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

On its face, the use of the term "individuals" in this determination clearly refers to all screeners, whether they are employed directly by the Federal Government, or are

working under a contract to the Federal Government. Congress did not differentiate between the two in ATSA.

If the employees of a qualified security company were to be deemed entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining, contrary to the TSA's January 8, 2003 order, the company would not only have failed to comply with an order applicable to the hiring or training of personnel, but according to the TSA's own determination, the company would be a security risk. If privately employed screeners were allowed to engage in collective bargaining, unlike the Federally-employed screeners, then pursuant to ATSA and Congressional direction, TSA should terminate the contract and bar the company from providing security screening services. This is clearly not the result Congress was seeking when it created the Federal screening programs in ATSA.

In drafting and passing ATSA, Congress clearly stated its belief that the airport security screening function, whether carried out by a Federal employee or a privately employed screener, is a *critical national security function* that must be the responsibility of the Federal Government, not air carriers. All screeners, no matter their immediate employer, play the same role and have the same responsibilities in homeland security and the war on terrorism. Congress made every effort to ensure that *all screeners* would be treated in a similar fashion and subject to the same high security standards. This includes the ability to best address security needs at each airport. As Admiral Loy, the former head of the TSA stated on January 9, 2003 when explaining the basis for his conclusion that collective bargaining was incompatible with air transportation security:

> Fighting terrorism demands a flexible workforce that can rapidly respond to threats....That can mean changes in work assignments

> and other conditions of employment that are not compatible with the duty to bargain with labor unions.

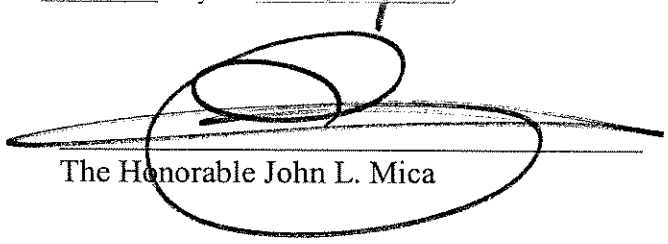
Labor relation orders and determinations that apply to the Federal screener workforce must be applied equally to the private screener workforce. To adhere to Congressional intent, there should be no difference in the level of security provided at our Nation's airports. The roles of the Federal security screener and the privately employed security screener are no different. Congress intended that all screeners be treated similarly with respect to the inability to strike and with respect to labor relations. Therefore, the incompatibility of collective bargaining with the flexibility required to wage the war on terrorism is no different for Federal employees and non-Federal employees fulfilling the same critical national security function. To determine otherwise would be adverse to the will of Congress.

Inasmuch as the TSA has definitively expressed its conclusion that all screeners "in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization," it follows that the Board lacks jurisdiction over the screeners involved in this case. The identity of their employer is immaterial. Assertion by the Board of jurisdiction in this case would necessarily result in material differentiation among screeners based solely on the identity of their employer and would clearly thwart the intent of Congress. In the event that the Board determines that jurisdiction is not explicitly barred, the Board should exercise its discretion not to assert jurisdiction by deferring to the TSA's determination that collective bargaining by airport screeners would compromise air transportation security.

V. CONCLUSION

For the reasons set forth above, the Board should decline to assert jurisdiction over airport screeners regardless of their employer.

Respectfully submitted, this 28 day of July, 2005.



The Honorable John L. Mica

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae brief was served this day via Certified mail as follows:

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This, 3rd day of August, 2005